Phil 203: Logic in Law
Fall 2022, Ding

Dobbs v. Jackson Women's Health Organization (2022)

Implied fundamental rights: Our cases so far

- *Griswold v. Connecticut* (1965): zone of privacy exists in the "penumbra," even if not explicitly mentioned anywhere in the constitution.
- *Loving v. Virginia* (1967): the zone of privacy includes a fundamental right to marry, which in turn includes a fundamental right to marry interracially (note the level of generality issue).
- *Roe v. Wade* (1973): the zone of privacy also includes a fundamental right to abortion.
    - Any restriction on a fundamental right is subject to *strict scrutiny*: constitutional iff (1) serves a "compelling" state interest, and (2) is "narrowly tailored" to serve that interest.
    - State interest in maternal health becomes compelling at the end of the 1st trimester.
    - State interest in potential human life becomes compelling at viability.
- *Planned Parenthood v. Casey* (1992): affirms *Roe* in name, but undermines it in substance.
    - Invents less stringent *undue burden test*: abortion restrictions are *un*constitutional iff it imposes an "undue burden" or a "substantial obstacle" in the path of the person seeking a pre-viability abortion.
    - Does away with the trimester framework, but retains the viability line.
- *Washington v. Glucksberg* (1997): the right to physician-assisted suicide is merely a liberty interest, not a fundamental right.
    - The *Glucksberg* test: implied fundamental right iff (1) "deeply rooted in this Nation's history and traditions," and (2) "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."
    - How does the *Glucksberg* test affect fundamental rights that had already been recognized by the Court? In *Obergefell*, Justice Kennedy, for the majority, seemingly simply distinguished *Glucksberg* because the Court, he explained, approached marriage differently.
- *Whole Woman's Health v. Hellerstedt* (2016) and *June Medical Services v. Russo* (2020): competing interpretations of the undue burden test.
- *Whole Woman's Health v. Jackson* (2021): acquiescing in private enforcement of a 6-week ban.

The new challenge

At issue is Mississippi's more conventional 15-week ban with exceptions for "medical emergency" and "severe fetal abnormality," designed specifically to test *Roe* and *Casey*.

- Recognizing that "[i]n an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability," a unanimous Fifth Circuit panel affirmed.
- On May 17, 2021, the Court granted cert to decide "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional."
    - The language seemed to imply the question was the viability line. In fact, this was how Mississippi initially argued the case: viability is arbitrary, and 15 weeks is not *that* earlier than 24 weeks anyway.
    - The state, however, swiftly changed strategy after Justice Barrett replaced the late Justice Ginsburg. In the merits briefing and at oral argument, they proposed that the Court should now overrule *Roe* and *Casey* entirely—rational basis review should be the test for all abortion restrictions throughout pregnancy. A majority agreed.

The equal protection issue

As we have discussed, the Court has never held that abortion restrictions constitute a case of sex

discrimination in violation of the Equal Protection Clause. But the majority in fact goes out of its way to preempt this argument:

> [W]e briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. . . . Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is *squarely foreclosed by our precedents*, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that *only one sex can undergo* does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretext designed to effect an invidious discrimination against members of one sex or the other." [cites *Geduldig*] (my emphasis)

Some issues to continue to think about:

- How persuasive is the deference to precedent when *Roe* is one year older than *Geduldig*?
- While the easy way out is to argue that abortion restrictions are sex discriminatory precisely because only one sex can undergo abortion, the really difficult question, as we've been discussing, is how to do this when you realize abortion is in fact not unique to women?

The substantive due process issue

The argument, as I understand it:

1. A liberty interest amounts to a fundamental right iff it is explicitly enumerated or passes the *Glucksberg* test (deeply rooted & ordered liberty).
2. The claimed right to abortion is not explicitly enumerated.
3. The claimed right to abortion fails the *Glucksberg* test (at least not deeply rooted).
4. Therefore, there is no fundamental right to abortion.

Note that, by the Court's own stare decisis principle, it does not directly follow that *Roe* and *Casey* should therefore be overruled. More on this later.

Which part of American history is relevant? (Premise 3)

The majority opinion focuses on English common law that predated the founding of the United States as well as history at the time of 14th Amendment's ratification in 1868:

- Abortion was a common law crime *after quickening* (roughly 16–18 weeks of pregnancy).
- Most states outlawed abortion at all stages of pregnancy in 1868.

Some immediate worries:

- Even assuming the relevance of common law, the 15-week ban is prior to quickening?
- Why should we defer to what most states did in 1868, when ratifying the 14th Amendment was meant to (radically, nonetheless) *change* what was permissible legislation (think about racial segregation, interracial marriage, etc.)?
    - The joint dissent: "But, of course, 'people' did not ratify the Fourteenth Amendment. Men did. . . . To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. . . . When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship."

By way of foreshadowing, consider *Lawrence*'s discussion of the relevance of history:

> In all events we think that our laws and traditions in the past half century are of most relevance here. [There is] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."

Question for discussion: Which part of American history is relevant to a substantive due process inquiry? Is there a principled way of deciding?

Why apply the Glucksberg test? (Premise 1)
Note that here the majority is applying the Glucksberg test *retroactively* to *Roe* and *Casey*. Would the other substantive due process decisions stand in light of *Glucksberg*?

- Is any of the following deeply rooted in this nation's history and traditions (again, which part of history and whose traditions)? Right against compulsory sterilization (*Skinner*), right to contraceptive use (*Griswold* and *Eisenstadt*), right to interracial marriage (*Loving*), right to same-sex intimacy (*Lawrence*), right to same-sex marriage (*Obergefell*), etc.
- The majority: don't worry, because abortion is different—"What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'" So, "The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect."
    - The joint dissent: this is an entirely unprincipled distinction—"Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure."
    - Also, one can certainly believe that contraceptives (and by a slight stretch of the imagination, even same-sex intimacy and marriage?) destroy potential life… The question is why the constitution must privilege *this* belief.

The majority thinks it has an answer:

> Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed.

Justice Kavanaugh, concurring, emphasizes this idea of neutrality: "Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral."

The dissent responds that

> eliminating [the abortion] right . . . is not taking a "neutral" position, as JUSTICE KAVANAUGH tries to argue. . . . [W]ould he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? . . . If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go on—and in fact we will. Suppose JUSTICE KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be "scrupulously neutral" for the Court to eliminate those rights

too? The point of all these examples is that when it comes to rights, the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers.

Question for discussion: Which conception of neutrality do you find more plausible, and why?

The stare decisis issue

Recall *Casey*'s stare decisis factors:

1. *Workability*: *Roe* is very straightforward to apply.
2. *Reliance interests*: Women rely on the right to abortion for their standing as equal citizens.
3. *Doctrinal affinity*: *Roe* is central to the Court's substantive due process cases.
4. *Factual changes*: No changes in the facts on the ground or society's understanding of these facts.
5. *Court's legitimacy*: "To overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."

Dobbs's stare decisis analysis: "Some of our most important constitutional decisions have overruled prior precedents" (cites *Brown*, among other cases).

1. *The nature of the Court's error*: *Roe* and *Casey* are "egregiously wrong," and they "wrongly removed an issue from the people and the democratic process." (What about *Brown*?)
2. *The quality of the reasoning*: *Roe*'s reasoning is "exceedingly weak" (cites liberal academics), and *Casey* fares no better.
3. *Workability*: The undue burden test "has scored poorly on the workability scale" (cites circuit split following *June Medical*).
4. *Effect on other areas of law*: Third-party standing doctrine, 1st Amendment doctrine (protesting outside entrance to abortion clinics), etc.
5. *Reliance interests*: Either none at all, or it's an empirical question (so ignore it), or just ignore it.
    - "Traditional reliance interests arise 'where advance planning of great precision is most obviously a necessity.' In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally 'unplanned activity,' and 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.' For these reasons, we agree . . . that conventional, concrete reliance interests are not present here."
    - "Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance."
        - But: "That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. . . . This Court has neither the authority nor the expertise to adjudicate those disputes."
        - Later: "And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law."
    - The joint dissent: "This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion."